

## § 240.14d-7

## 17 CFR Ch. II (4-1-02 Edition)

offer may be extended and, if so, the procedures for extension of the tender offer.

*Instruction to paragraph (b):* If the additional tender offer materials are summary advertisements, they also must include the information required by paragraphs (d)(2)(v) of this section.

(c) *Material changes.* A material change in the information published or sent or given to security holders must be promptly disclosed to security holders in additional tender offer materials.

(d) *Information to be included—(1) Tender offer materials other than summary publication.* The following information is required by paragraphs (a)(1), (a)(2)(ii), (a)(3)(ii) and (a)(4) of this section:

(i) The information required by Item 1 of Schedule TO (§240.14d-100) (Summary Term Sheet); and

(ii) The information required by the remaining items of Schedule TO (§240.14d-100) for third-party tender offers, except for Item 12 (exhibits) of Schedule TO (§240.14d-100), or a fair and adequate summary of the information.

(2) *Summary Publication.* The following information is required in a summary advertisement under paragraphs (a)(2)(i) and (a)(3)(i) of this section:

(i) The identity of the bidder and the subject company;

(ii) The information required by Item 1004(a)(1) of Regulation M-A (§229.1004(a)(1) of this chapter);

(iii) If the tender offer is for less than all of the outstanding securities of a class of equity securities, a statement as to whether the purpose or one of the purposes of the tender offer is to acquire or influence control of the business of the subject company;

(iv) A statement that the information required by paragraph (d)(1) of this section is incorporated by reference into the summary advertisement;

(v) Appropriate instructions as to how security holders may obtain promptly, at the bidder's expense, the bidder's tender offer materials; and

(vi) In a tender offer published or sent or given to security holders by use of stockholder lists and security position listings under §240.14d-4(a)(3), a

statement that a request is being made for such lists and listings. The summary publication also must state that tender offer materials will be mailed to record holders and will be furnished to brokers, banks and similar persons whose name appears or whose nominee appears on the list of security holders or, if applicable, who are listed as participants in a clearing agency's security position listing for subsequent transmittal to beneficial owners of such securities. If the list furnished to the bidder also included beneficial owners pursuant to §240.14d-5(c)(1) and tender offer materials will be mailed directly to beneficial holders, include a statement to that effect.

(3) *No transmittal letter.* Neither the initial summary advertisement nor any subsequent summary advertisement may include a transmittal letter (the letter furnished to security holders for transmission of securities sought in the tender offer) or any amendment to the transmittal letter.

[64 FR 61460, Nov. 10, 1999]

### § 240.14d-7 Additional withdrawal rights.

(a) *Rights.* (1) In addition to the provisions of section 14(d)(5) of the Act, any person who has deposited securities pursuant to a tender offer has the right to withdraw any such securities during the period such offer request or invitation remains open.

(2) *Exemption during subsequent offering period.* Notwithstanding the provisions of section 14(d)(5) of the Act (15 U.S.C. 78n(d)(5)) and paragraph (a) of this section, the bidder need not offer withdrawal rights during a subsequent offering period.

(b) *Notice of withdrawal.* Notice of withdrawal pursuant to this section shall be deemed to be timely upon the receipt by the bidder's depositary of a written notice of withdrawal specifying the name(s) of the tendering stockholder(s), the number or amount of the securities to be withdrawn and the name(s) in which the certificate(s) is (are) registered, if different from that of the tendering security holder(s). A bidder may impose other reasonable requirements, including certificate numbers and a signed request for withdrawal accompanied by a signature

## Securities and Exchange Commission

## § 240.14d-9

guarantee, as conditions precedent to the physical release of withdrawn securities.

(Secs. 7, 10, 19(a), 48 Stat. 78, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 8, 68 Stat. 685; sec. 308(a)(2), 90 Stat. 57; secs. 3(b), 10(b), 13, 14, 23(a), 48 Stat. 882, 891, 894, 895, 901; sec. 203(a), 49 Stat. 704; sec. 8, 49 Stat. 1379; secs. 4, 5, 78 Stat. 569, 570; secs. 2, 3, 82 Stat. 454, 455; secs. 1, 2, 3-5, 84 Stat. 1497; secs. 3, 10, 18, 89 Stat. 97, 119, 155; sec. 308(b), 90 Stat. 57; secs. 202, 203, 91 Stat. 1494, 1498, 1499; sec. 20, 49 Stat. 833; sec. 319(a), 53 Stat. 1173; sec. 38(a), 54 Stat. 841; 15 U.S.C. 77g, 77j, 77s(a), 78c(b), 78j(b), 78m, 78n, 78w(a), 79t, 77ttt(a), 80a-37(a))

[44 FR 70345, Dec. 6, 1979, as amended at 51 FR 25882, July 17, 1986; 51 FR 32630, Sept. 15, 1986; 64 FR 61461, Nov. 10, 1999]

### § 240.14d-8 Exemption from statutory pro rata requirements.

Notwithstanding the pro rata provisions of section 14(d)(6) of the Act, if any person makes a tender offer or request or invitation for tenders, for less than all of the outstanding equity securities of a class, and if a greater number of securities are deposited pursuant thereto than such person is bound or willing to take up and pay for, the securities taken up and paid for shall be taken up and paid for as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor during the period such offer, request or invitation remains open.

(Sec. 23, 48 Stat. 901; sec. 203(a), 49 Stat. 704; sec. 8, 49 Stat. 1379; sec. 10, 78 Stat. 580; sec. 3, 82 Stat. 455; secs. 3-5, 84 Stat. 1497; sec. 18, 89 Stat. 155; 15 U.S.C. 78n(e), 78w(a))

[47 FR 57680, Dec. 28, 1982]

### § 240.14d-9 Recommendation or solicitation by the subject company and others.

(a) *Pre-commencement communications.* A communication by a person described in paragraph (e) of this section with respect to a tender offer will not be deemed to constitute a recommendation or solicitation under this section if:

(1) The tender offer has not commenced under § 240.14d-2; and

(2) The communication is filed under cover of Schedule 14D-9 (§ 240.14d-101) with the Commission no later than the date of the communication.

#### *Instructions to paragraph (a)(2):*

1. The box on the front of Schedule 14D-9 (§ 240.14d-101) indicating that the filing contains pre-commencement communications must be checked.

2. Any communications made in connection with an exchange offer registered under the Securities Act of 1933 need only be filed under § 230.425 of this chapter and will be deemed filed under this section.

3. Each pre-commencement written communication must include a prominent legend in clear, plain language advising security holders to read the company's solicitation/recommendation statement when it is available because it contains important information. The legend also must advise investors that they can get the recommendation and other filed documents for free at the Commission's web site and explain which documents are free from the filer.

4. See §§ 230.135, 230.165 and 230.166 of this chapter for pre-commencement communications made in connection with registered exchange offers.

(b) *Post-commencement communications.* After commencement by a bidder under § 240.14d-2, no solicitation or recommendation to security holders may be made by any person described in paragraph (e) of this section with respect to a tender offer for such securities unless as soon as practicable on the date such solicitation or recommendation is first published or sent or given to security holders such person complies with the following:

(1) Such person shall file with the Commission a Tender Offer Solicitation/Recommendation Statement on Schedule 14D-9 (§ 240.14d-101), including all exhibits thereto; and

(2) If such person is either the subject company or an affiliate of the subject company,

(i) Such person shall hand deliver a copy of the Schedule 14D-9 to the bidder at its principal office or at the address of the person authorized to receive notices and communications (which is set forth on the cover sheet of the bidder's Schedule TO (§ 240.14d-100) filed with the Commission; and

(ii) Such person shall give telephonic notice (which notice to the extent possible shall be given prior to the opening of the market) of the information required by Items 1003(d) and 1012(a) of Regulation M-A (§ 229.1003(d) and § 229.1012(a)) and shall mail a copy of